Supreme Court of the United States

October Term, 1948

No. 448

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York, New York,

Appellant,

vs.

C. EMORY GLANDER,
Tax Commissioner of Ohio,

Appellee.

BRIEF FOR APPELLANT

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CASES CITED

OTHER AUTHORITIES

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Statement as to Jurisdiction and the Decisions Below

This appeal, under Section 1257(2) of Title 28, United States Code, is from a final judgment of the Supreme Court of Ohio affirming a decision of the Board of Tax Appeals in the Department of Taxation of Ohio.

This Court has noted "probable jurisdiction". (R. 67).

By the determination affirmed, the Tax Commissioner of Ohio levied an *ad valorem* property tax on the face amount of certain accounts receivable of the appellant, a Virginia corporation with its principal place of business and executive offices in New York City, and with one of its manufacturing plants in Ohio.

The Supreme Court of Ohio has certified that it considered and adversely determined the appellant's contentions that Sections 5325-1, 5328-1 and 5328-2 of the Gen-

eral Code of Ohio, as applied in this case, were contrary to the "commerce" clause in the United States Constitution and contrary to the "due process" and "equal protection" clauses in the Fourteenth Amendment (R. 8, 32-3).

The decision of the Supreme Court of Ohio is reported in 150 O. S. 229. The denial of the application for rehearing is noted unofficially on page 340 of the October 11, 1948, issue of the Ohio Bar. The decision of the Board of Tax Appeals of Ohio is unofficially reported in 72 N. E. (2d) 592.

The facts have been stipulated (R. 51-8).

The Ohio Statutes Involved

These are printed in full in the Appendix (p. 46, *post*). The pertinent portions are quoted later in the Statement of the Case (p. 8, *post*).

Questions of Law Involved

1. Do Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio, as applied in the instant case, violate the "commerce" clause (Section 8, Article I) of the United States Constitution? (See Point I, p. 11, *post*.)

2. Do these Sections, as so applied, violate the "due process" clause of the Fourteenth Amendment? (See Point II, p. 31, *post*.)

3. Do these Sections, as so applied, violate the "equal protection" clause of the Fourteenth Amendment? (See Point III, p. 41, *post*.)

Assignments of Error

The Assignments of Error, presenting these three questions, are at pages 3 and 4 of the Record.

A Concise Statement of the Case

The Gist of the Case

1. The Ohio Tax Commissioner has levied a direct *ad valorem* property tax on a segment (hereinafter described) of the appellant's gross interstate business, to wit: on the face amount of certain of its accounts receivable embodied in contracts made by the appellant at its executive offices in New York for the sale and delivery of goods in interstate commerce. The avails were payable and were paid to appellant in New York for inclusion in its general fund there maintained and for use in its general business there conducted, including its interstate business.

These interstate contracts were made by the appellant at its New York office in acceptance of orders from "open" and "monopoly" states and for delivery in such states (R. 54-5). The orders were not for beverages specified as located in any particular warehouse or manufactured in any particular distillery, but were for beverages designated by brand name or other general description. Such orders could properly be filled by delivery of the designated quantity shipped from any source or sources as directed by the appellant's executives in New York; and they were so filled (R. 52-7).

2. The Ohio Tax Commissioner has levied an *ad valorem* property tax on the face amount of the appellant's interstate business in terms of accounts receivable, represented by the shipments which its New York executives directed to be made from its Carthage distillery in Ohio (R. 56-7).

3. The Ohio Board of Tax Appeals noted, in its opinion, that formerly it had interpreted the Ohio statutes as to taxes on accounts receivable payable to non-residents as requiring that the taxable receivables not only "arose

in the conduct" of the Ohio business of the non-resident taxpayer, but also were "so used as to become an integral part of the business carried on in" Ohio; "and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer" (R. 63).

The Board of Tax Appeals further noted, however, that its former view to this effect had been overruled by the Ohio Supreme Court in *Ransom & Randolph Co.* v. *Evatt, Tax Commissioner*, 142 O. S. 398, 404, 408 (1944); and that, under this overriding determination, accounts receivable as defined in the Ohio statutes, owned by a non-resident of Ohio, were nevertheless taxable in Ohio, whether or not their avails were applied or intended to be applied in Ohio (R. 63).

4. The Ohio Board of Tax Appeals has further noted in this very case that this later determination by the Ohio Supreme Court "presents, to our mind, *a serious question as to the constitutionality of said statutory provisions* as so construed under the Due Process of Law clause of the Federal Constitution" (R. 64). (Italics ours.)

5. The decision by the Ohio Supreme Court exposes the appellant to the hazard of *multiple taxation on the same accounts receivable*, to wit:

(a) Taxation by New York ("the commercial domicile" of the appellant). (*Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 211-5.)

(b) Taxation by Virginia ("the legal domicile" of the appellant). (*Greenough* v. *Tax Assessors*, 331 U. S. 486, 492-3; *Newark Fire Ins. Co.* v. *State Board*, 307 U. S. 313, 318; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325.)

(c) Taxation by any other state which chooses to levy a tax on accounts receivable resulting from orders calling for delivery for consumption in such other

state. (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 58; *General Trading Co.* v. *Tax Comm'n*, 322 U. S. 335.)

(d) Taxation by any other state which chooses to levy a tax on accounts receivable resulting from sales by an established agent of the appellant located in such other state, or resulting from sales of goods delivered from a stock maintained in such other state.

By the same token, the decision by the Ohio Supreme Court exposes the appellant's interstate commerce to the risk of *a multiple tax burden*. It has one or more similar plants in Maryland, Pennsylvania, Missouri, Kentucky, Illinois and New Jersey (R. 52).

6. Under the Ohio tax statutes the appellant is subject to a tax on its right to possess and use its real property and its tangible personal property in Ohio, including whiskey in bulk and in cases (Ohio General Code, §5625-3). (See p. 15, *post*.)

It is also subject, for its privilege of engaging in manufacturing in Ohio, to a franchise tax based on a formula which includes (among other factors) the value of all its property used in business in Ohio and of all its goods manufactured in Ohio irrespective of where sold (Ohio General Code, §§5495, 5498, 5499). (See p. 15, *post*.)

The Appellant's Interstate Business

The appellant is a Virginia corporation. It holds, in that state, its stockholders' annual meetings (R. 51):

It is also licensed to do business, as a foreign corporation, in the State of New York. Since 1924 it has maintained its principal business and executive office in the City of New York, where its directors' meetings are held; its dividends are declared and paid; its stock registrars and transfer agents are located; its executives have their

offices; its general fund is maintained; its contracts are made; and all its business activities and policies are determined, directed and controlled (R. 51).

All the appellant's accounts payable are paid by checks prepared and signed in its New York office, and drawn on funds deposited in New York City banks, except that local payrolls for plant employees (including those employed at Carthage, Ohio) and local excise taxes are paid from funds on deposit in local banks, which funds are in turn supplied to such banks by checks drawn in appellant's New York office on its general fund in New York City banks (R. 51-2).

All the appellant's receivables are posted in its New York City books and are payable at its New York City offices; and the avails are deposited in its New York City bank accounts. Such avails are mingled with the appellant's general fund in New York and are used in its business throughout the United States (R. 52). All extensions of credit must be authorized by New York (R. 55).

The appellant's principal business is the manufacture and sale of alcohol, whiskey and other alcoholic beverages. It owns and operates distilling or rectifying plants and plant warehouses in many states. Shipments of products are made from such plants or plant warehouses as its New York office may direct for filling orders received (R. 55, 56). Shipments from all plants are made for the account of and are billed by the appellant (R. 52). Plants may not ship except upon orders from New York (R. 55).

The conditions of sale, in the case of the so-called "open" states, require that all orders shall be forwarded to the regional sales office for transmittal to New York and shall be subject to approval and acceptance by its New York office. The appellant maintains regional sales offices in various cities in the "open" states. It does not maintain a regional sales office in Ohio, which is a "monopoly" state (R. 54-5). Orders from "monopoly" states

go directly to the appellant's New York office, and are there subject to acceptance or rejection (R. 55).

The forms and "Conditions of Sale" used by the appellant in the transaction of all its business are reproduced or described in the Stipulation of Facts (R. 53-6).

All invoices are headed (R. 56):

> "National Distillers Products Corporation
> 120 Broadway
> New York, New York".

A note on the customer's copy of the invoice reads (R. 56):

> "Make all checks payable to
> National Distillers Products Corporation
> 120 Broadway
> New York, New York".

The Ohio Statutes for the Taxation of Accounts Receivable of Non-Residents

These statutes are printed in full in the Appendix hereto (p. 46, *post*). The relevant portions are as follows:

Section 5325-1 of the General Code of Ohio is entitled: "Application of term 'used in business'; definition of word 'business'." The entire section reads as follows:

> "Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and pre-

paid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1 of the General Code of Ohio is entitled: "Property to be entered on classified tax list and duplicate; exemption". It provides in part as follows:

"* * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation * * *."

Section 5328-2 of the General Code of Ohio is entitled: "Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid". It provides in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by

an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

* * * *

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The nature of the taxation under these statutes has been authoritatively declared by the Supreme Court of Ohio in *Bennett* v. *Evatt*, 145 O. S. 587, as follows (p. 593):

"Concededly a tax based on the income yield of intangible property is not an income tax, an excise tax or a franchise tax. It necessarily is a tax upon property."

The Action of the Ohio Tax Authorities

1. During 1943 the appellant kept at its manufacturing plant at Carthage, Ohio, whiskey in barrels for the purpose of aging (R. 57).

Ninety percent of the whiskey shipped from the Carthage plant in 1943 was blended, rectified or bottled for

shipment upon receipt of shipping directions from appellant's New York office, and went to customers and to appellant's warehouses in other states as directed by its New York Office. The remaining ten percent of whiskey shipped to customers and warehouses in other states had previously, on directions from New York, been shipped to the Carthage plant from other plants of the appellant outside of Ohio for the purpose of transshipment (R. 56-7).

No whiskey was rectified, blended or bottled in Ohio for inventory for shipping against future orders (R. 57).

2. For the tax year 1944 the appellant filed with the Ohio Tax Commissioner its annual report for personal property taxes. It did not allocate any of its accounts receivable to the State of Ohio.

Thereafter the Ohio Tax Commissioner surcharged such annual report "by ascribing an Ohio situs to accounts receivable of $2,996,670, in determining and assessing the (appellant's) intangible personal property tax" (R. 57).

This sum, according to the stipulation of facts herein, was the total of the accounts receivable in the cases where the appellant's products had been manufactured in and shipped from its Ohio plant, in accordance with directions from its New York office, "to customers throughout the United States" in the course of its aforesaid interstate business during 1943 (R. 57).

This surcharge appears on page 50-C of the Record and reads as follows:

> "2,996,670 = $8990.01. Assessment under decision of the Supreme Ct. of Ohio in the case of R. & R. Co. v. Evatt, 142 O. S. 398."

Neither Virginia nor New York has as yet any personal property taxes on accounts receivable (R. 58).

POINT I

The tax, as applied below to this appellant, is a direct tax on its interstate business.

Moreover, the tax, as so applied, directly burdens interstate commerce, and subjects it to the hazard of multiple taxation.

Hence, for all these reasons, the determinations under appeal have invaded the area of trade which the Commerce Clause keeps free from interference by the States.

A

The Commerce Clause as a limitation on the taxing power of the states.

1. In the first place, the Commerce Clause is not merely authority for enactment by Congress of laws for the protection and promotion of commerce among the states. It is also, by its own force and without implementing legislation by Congress, a limitation upon the power of the states. It has "created an area of trade free from interference by the states", *Freeman* v. *Hewit*, 329 U. S. 249, 252. See also *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769; *Morgan* v. *Virginia*, 328 U. S. 373, 380, 387; and other cases cited at pages 18 to 28, *post*.

Under the Commerce Clause, a state is automatically precluded from taxing "the very process of interstate commerce", or from throwing on interstate commerce the burden involved in a direct tax. "The power to tax is a dominant power over commerce" and cannot be exercised by the states (*Freeman* v. *Hewit*, *supra*, p. 253).

Were this otherwise, interstate commerce could be restricted and even paralysed by "barriers which it was the object of the commerce clause to remove", (*Western Live Stock* v. *Bureau*, 303 U. S. 250, 256.)

2. In the second place, the Commerce Clause protects the economy of the nation from being disintegrated by duplicating taxes imposed by several or more states upon the same interstate business.

As Mr. Justice Rutledge has truly said in his "*A Declaration of Legal Faith*," 72, 73:

> "From the disunited states of 1786, which interstate trade barriers had created, has grown the United States of 1946. No small part of that growth has been due to the effects of the commerce clause and its administration. Perhaps no other constitutional provision has played a greater part * * *. A balkanized America today would be vulnerable to attack from without and would be unequal to maintaining our people within."

B

The direct tax on the appellant's interstate business

1. In the present case, Ohio has imposed such a direct tax on the very process and proceeds of interstate commerce. It has sought to tax directly the face amount of choses in action which from origin to end are part of, represent and embody interstate commerce.

As said by this Court in *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 212-3: "the tax is a property tax on the accounts receivable, as separate items of property"; and these separate items of property "are not to be regarded as parts of the manufacturing plants where the goods sold are produced", "but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale".

These statements by this Court are here particularly applicable because the accounts receivable here involved are themselves obligations and proceeds embodied in interstate sales contracts not made in Ohio at all—contracts

which are a part of and constitute interstate commerce and create interstate indebtedness neither covenanted nor accruing nor localized nor payable in Ohio.

In their terms, these contracts neither called for any action by the appellant in Ohio nor specified that any goods in Ohio should be the subject of delivery thereunder. That goods were delivered out of the appellant's plant in Carthage, Ohio, was not because of any localizing specification in the contracts themselves but solely because of the circumstance that the appellant's executives at its office in New York directed shipment therefrom (R. 56).

Furthermore, New York, not Ohio, was the seller state; and various of the states were the buyer states. The contract, in which the receivable was an embodied obligation, had no situs whatever in Ohio. The debt which, by that contract, the buyer undertook, was not undertaken in Ohio, and it was not payable in Ohio. It had its sole embodiment in, and owed its incurring solely to, an interstate contract constituted of an order and acceptance in states other than Ohio.

Ohio contributed nothing to the making of the contract or to the inclusion therein of any of its terms. If was not an Ohio contract. The appellant was under no obligation, legal or moral, to pay tribute to Ohio for the making of it.

Moreover, a receivable of the group here involved was not an intrastate incident which was distinct from the interstate contract and from the interstate commerce of which it was a term and part. It could not possibly be separated therefrom and be given independent existence and localization in Ohio.

No suit could have been brought thereon by the appellant in the Ohio courts unless, as in the case of any transitory chose in action, the defaulting debtor could be found within that jurisdiction,—a contingency equally available to the appellant in any state where the defaulting debtor could be found.

2. Ohio's direct tax on the face amount of these accounts receivable is indistinguishable in business actualities from a direct tax on the *gross proceeds* which they obligate, and hence on the interstate commerce itself.

Constitutional provisions protective of the realities of interstate commerce call for practical consideration of commercial operation and fiscal relationship, and not for the techniques of mere verbalisms or tags of nomenclature. Direct state taxes on the gross receipts or proceeds which are the very grist of the mills of interstate commerce violate the Commerce Clause and jeopardize the cohesion of the nation. (*Nippert* v. *Richmond*, 327 U. S. 416, 431; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444.)

3. Even if (contrary to the fact and the law) Ohio could be said to have contributed to or had some part in the making of the contract in which the receivable was an embodied obligation, neither the decisions below nor the Ohio statutes provide for any apportionment as between Ohio's (hypothetical) part and the part played by the state whence the order came and the part played by New York where the order was accepted. There was not even an apportionment as between the parts which the several states played or might play in the performance of the contract or in any required enforcement. There was not even an apportionment based on the extent, if any, to which the avails could actually or theoretically be said to be later used in Ohio by reason of their total inclusion and dissolution in the appellant's general fund in New York (R. 52).

Ohio has simply and directly taxed the face amount of the whole receivable,—not any use of the avails in Ohio. In practical effect, Ohio has taxed the gross amount of what came out of and through interstate commerce into the appellant's general bank account in New York from an indebtedness contracted in New York rather than Ohio and covenanted for by a bargain made as between the orderer in such state and the acceptor in New York.

Ohio has already imposed its tax on all the appellant's real and personal property therein (R. 56), and on the appellant's franchise to do business and manufacture therein (this page, *post*). To the making of the interstate contracts which embodied these accounts receivable, Ohio has contributed no benefit or protection whatever,—certainly none "adequate to support a tax exaction" of the present character, and not fully recompensed by other tax exactions. (*Greenough* v. *Tax Assessors*, 331 U. S. 486, 491; *McCarroll* vs. *Dixie Lines*, 309 U. S. 176.)

C

Appellant is subject to Ohio's taxes on its real property, on its tangible personal property, and on its franchise to manufacture, in Ohio.

The Stipulation of Facts states (R. 56):

> "The corporation paid real estate taxes on its plant and plant warehouses in Ohio and personal property taxes on its machinery, equipment and other tangible personal property in Ohio, including its products (whether in bulk or in cases) and which products subsequently were shipped from its Ohio plant warehouses to its customers in other states on orders solicited and accepted by its agents and employees in such other states."

Ohio's provisions for taxing real and personal property in that state are in Chapter 12 of the Ohio General Code; and particularly in §5625-3. Special provisions for the taxing of machinery, manufactured articles or materials and merchandise held for sale, are in §§5382, 5385, 5386 and 5388. Tangible property is defined in §5325.

§§5385, 5386, 5387 and 5388 provide for the valuation for tax purposes "of all articles purchased, received or otherwise held for the purpose of being used, in whole or

in part, in manufacturing, combining, rectifying or refining;" and "of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto". The same sections also provide for the listing for tax purposes "of all personal property used in business and belonging to a manufacturer".

The franchise tax on the right of a foreign corporation to do business and manufacture in Ohio is set forth in §§5495, 5498 and 5499 of the Ohio General Code. The tax follows a formula which includes (among other factors) the value of all its property used in business in Ohio and the value of all its goods manufactured in Ohio irrespective of where sold.

D

The application by the Ohio Supreme Court of the tax provisions here involved

1. As already stated (pp. 3, 4, *supra*), the Ohio Board of Tax Appeals had at one time held (R. 63):

> "Before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, *but were therein so used as to become an integral part of the business carried on in such other state.*" (Italics ours.)

Subsequently the Supreme Court of Ohio, in *The Ransom & Randolph Co.* v. *Evatt*, 142 O. S. 398, eliminated the limitation italicized in the above quotation and held that "the business situs" of a taxable receivable did not depend upon whether "the avails thereof are being ap-

plied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere" (R. 63).

As a result, the Ohio Board of Tax Appeals in this very case has said that that decision by the Ohio Supreme Court "presents, to our mind, a serious question as to the constitutionality of such statutory provisions as so construed under the Due Process of Law Clause of the Federal Constitution" (R. 64).

2. In this connection, it is pertinent to call to the attention of this Court the remarks of Hon. Aubrey A. Wendt, then assistant attorney general of Ohio in charge of tax matters, in a paper on "Tax Situs of Intangibles" read at the National Tax Administrators Association convention in Toronto, Ontario, subsequent to the decision of the Ohio Board of Tax Appeals but prior to the decision of the Supreme Court of Ohio in the instant case.

These remarks are reprinted in the Prentice-Hall State and Local Tax Service (Ohio) at paragraph 34,264. Pertinent excerpts therefrom are as follows:

> "In Ohio our legislature has undertaken to set forth the conditions necessary for the establishment of a business situs. The provisions apply to both domestic and foreign corporations. It is further provided that if the other state concerned has reciprocal provisions, there shall be no double taxation of such property. Two factors are made essential. First, that the intangibles arise out of business, and, second, that they shall be used in business. Without going into our Ohio statute in detail, it is sufficient to say that our taxing authorities originally interpreted the statute as meaning that Ohio would tax all intangibles of domestic corporations except such portions thereof as were both used in business and arose in business in a foreign state, and, conversely, that we would tax no intangibles of foreign corporations unless they were both used in business

and arose in business in Ohio. A few years ago our Supreme Court upset this interpretation, holding that the intangibles of a domestic corporation might be used in business anywhere; the sole test, the court said, is where the credits arose. In reversing his procedure, the Tax Commissioner was thereupon obliged to allocate to Ohio all intangibles of foreign corporations which were used in business anywhere if such intangibles arose in Ohio. As I stated at the outset, this interpretation has been challenged in three cases which were submitted to our Supreme Court nearly a year ago, since which time we have been anxiously awaiting decisions. In these three cases, it was contended that the Commissioner's present practice, which follows the rule previously announced by our Supreme Court with respect to domestic corporations, is either contrary to the statutes, or that the statutes are unconstitutional in that they violate the Fourteenth Amendment by taking property without due process. We are inclined to think that our Supreme Court must either be frank enough to admit its error and overrule the former case, make a strained attempt to distinguish the former case, or else hold the statute to be unconstitutional. *If the court should decide to follow the rule it formerly announced in respect of domestic corporations, reversal by the United States Supreme Court seems almost inevitable. To hold otherwise would be to permit a state by legislative fiat to tax property not within its territorial jurisdiction.*" (Italics ours.)

E

Controlling Decisions by this Court.

(1) A controlling authority, *a fortiori*, is *Freeman* v. *Hewit*, 329 U. S. 249, decided December 16, 1946, which dealt with an Indiana tax upon "the receipt of the entire gross income" of Indiana residents and domiciliaries (p. 250).

There a trustee (domiciled in Indiana) of an estate created by the will of an Indiana resident instructed his Indiana broker to arrange for the sale at stated prices of specified securities held by him in Indiana. They were offered for sale on the New York Stock Exchange through the Indiana broker's New York correspondents. When a purchaser was found, the trustee delivered the securities in Indiana to his Indiana broker, who mailed them to New York. The New York brokers made delivery, received the purchase price, and remitted the proceeds (less expense and commission) to the Indiana broker, who delivered these proceeds to the trustee in Indiana.

Since the "securities" involved were in law but evidences of choses in action, the sale was, as this Court recognized (p. 258), "an interstate sale of intangibles".

On these facts this Court reversed the Supreme Court of Indiana which had "sustained the tax on the ground that the *situs* of the securities was in Indiana" (p. 251). This Court held (to quote two headnotes):

> "1. The Indiana Gross Income Tax Act of 1933 cannot constitutionally be applied to the gross receipts from these sales, since it would constitute a direct burden on interstate commerce in violation of the Commerce Clause."
>
> "3. The Commerce Clause protects interstate sales of intangibles as well as interstate sales of tangibles."

This decision is, we submit, a controlling authority, *a fortiori*, because there the owner of the securities was a resident of the taxing state and physically possessed in that state the very securities which he offered for sale, and which he sent to New York in fulfillment of the contract for their sale. The whole proceeds (less expenses and commission) came back physically to the owner in Indiana.

None of these elements of fact is present in the instant case. Notwithstanding their presence in the *Freeman* case, this Court there said (p. 255):

> "This case, like *Adams Mfg. Co.* v. *Storen, supra,* involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale."

Again (p. 256):

> "These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."

And again (p. 257):

> "The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo* v. *Michigan,* 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S. 326."

Mr. Justice Rutledge in his concurring opinion said (p. 283):

> "I think the result now reached is justified, as necessary to prevent the cumulative and therefore discriminatory tax burden which would rest on or seriously threaten interstate commerce if more than one state is allowed to impose the tax, as does Indiana, upon the gross receipts from the sale without appor-

tionment or credit for taxes validly imposed elsewhere. This result would follow in view of the *Berwind White* decision and others like it, if not only the state of the market but also the forwarding state could tax the sale 'to the fullest extent' upon the gross receipts. For this reason I concur in the result."

So, likewise, in the instant case. By creating a direct, *ad valorem* tax on the face amount of choses in action embodied in and created by interstate sales contracts not made in Ohio, Ohio has attempted to tax the very process and proceeds of interstate commerce, and has exposed that commerce and the appellant to the hazard of restrictive and multiple tax burdens.

The tax here involved is upon accounts receivable valued in terms of the gross proceeds which they represent. It is equivalent in substance and practical effect to a direct tax on the gross proceeds or receipts themselves and hence on the interstate commerce itself. In *Nippert v. Richmond*, 327 U. S. 416, this Court said (pp. 424, 431):

"It is old doctrine, notwithstanding many early deviations, that the practical operation of the tax, actual or potential, rather than its descriptive label or formal character is determinative. * * *

"Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern."

2. In *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, decided March 10, 1947, this Court had before it a New York City percentage tax "for the privilege of carrying on" business therein, measurable by "all receipts" allocable to such business. This Court held (to quote the headnotes):

"1. New York City levied an excise tax on the gross receipts of a stevedoring corporation engaged wholly within the territorial limits of the City in loading and unloading vessels moving in interstate and foreign commerce. *Held:* Such a tax is invalid, since

it would burden interstate and foreign commerce in violation of the Commerce Clause of the Constitution.

2. Loading and unloading are essential parts of transportation itself. Therefore, stevedoring is essentially a part of interstate and foreign commerce and cannot be separated therefrom for purposes of local taxation."

Obviously, the proceeds of interstate commerce—the obligation to pay for the interstate sale—is far more "inseparable" from such commerce than the mechanical, objective and localized act of stevedoring.

In the course of its decision, this Court cited *Freeman* v. *Hewit, supra,* and said (p. 429):

> "A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as grounds for their invalidation. *Western Live Stock* v. *Bureau,* 303 U. S. 250, 255. • • • The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—*ad valorem,* net income or excise. Cf. *Western Live Stock* v. *Bureau, supra,* 254."

Again (p. 433):

> "We reaffirm the rule of *Puget Sound Stevedoring Company.* 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman* v. *Hewit, supra,* p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences."

3. In *Nippert* v. *City of Richmond,* 327 U. S. 416, decided February 25, 1946, a municipal ordinance of Rich-

mond imposed upon persons "engaged in business as solicitors" an annual license tax of "$50 and one-half of one percentum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000". Under that ordinance the appellant was convicted and fined. This Court held that the ordinance, as so applied, violated the Commerce Clause; and said (p. 434):

> "Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against."

It is significant that the prevailing opinion in the *Nippert* case cited (p. 428) *Adams Mfg. Co.* v. *Storen* (p. 25, *post*); and that, in his dissenting opinion, Mr. Justice Douglas said (p. 435):

> "The Court has not shared the doubts which some of us have had concerning the propriety of the judiciary acting to nullify state legislation on the ground that it burdens interstate commerce. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 784, 795, dissenting opinions. But the policy of the Court is firmly established to the contrary."

4. In *McLeod* v. *Dilworth Co.*, 322 U. S. 327, decided May 15, 1944, a Tennessee corporation, which had no sales office in Arkansas, made contracts in Tennessee for sale and delivery by common carrier in Arkansas. Some orders were solicited and obtained in Arkansas by traveling salesmen domiciled in Tennessee. All orders were taken subject to acceptance by the corporation in Tennessee. No collections were made in Arkansas. The Supreme Court of Arkansas construed the Arkansas tax statute, which imposed a percentage tax upon "the gross receipts" from these sales in Arkansas, as a sales tax and not a use tax; and held that, as so applied, it violated the Commerce

Clause of the Federal Constitution. This determination was upheld by this Court which said (p. 330):

> "A sales tax is a tax on the freedom of purchase —a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. *The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.*" (Italics ours.)

5. In *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, decided January 3, 1939, this Court had before it a percentage tax imposed by the State of Washington upon "the act or privilege of engaging in business activities", and measured by the "gross income of the business."

The appellant was engaged in the business of marketing fruit shipped by it from Washington and Oregon to the places of sale in various other states and in foreign countries. The appellant was a Washington corporation having therein its main office at which it made the contracts for the shipments to its out-of-state purchasers. The fruit so shipped was grown partly in Washington and partly in Oregon. The avails of the sale were remitted to the appellant at its home office in Washington. Occasional sales were made to purchasers in Washington.

The Supreme Court of Washington held that the appellant's business was sufficiently "local" (p. 437); but this Court held the tax invalid as in violation of the Commerce Clause of the Federal Constitution. This Court said (p. 439):

"If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co.* v. *Storen, supra,* 310, 311; cf. *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 225, 227; *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650; see *Western Live Stock* v. *Bureau of Revenue, supra,* 260. Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

6. In *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, decided May 16, 1938, this Court had before it the Indiana Gross Income Tax Act which imposed upon Indiana corporations a percentage tax upon, "*inter alia,* gross receipts derived from trades, businesses, or commerce" (p. 308). The appellant, an Indiana corporation, manufactured road machinery. It maintained its home office, principal place of business and its factory in Indiana. It sold eighty per cent of its products to customers in other states and foreign countries upon orders taken subject to approval at the home office. Shipments were made from the factory in Indiana and payments were remitted to the home office in Indiana.

This Court reversed the Supreme Court of Indiana, and held that the tax could not constitutionally be applied to the gross receipts from the appellant's sales in interstate commerce, since such application contravened the Commerce Clause of the Federal Constitution.

This Court said (p. 311):

> "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales.
>
> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon interstate commerce prohibited by Article I, §8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

7. In *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, this Court was concerned with an excise tax imposed by Massachusetts on the appellant Connecticut corporation, whose general business was manufacturing and selling silk fabrics. It maintained a local office in Massachusetts, with a stock of samples and a force of office and traveling salesmen, merely to obtain orders locally and in other states, subject to approval by its home office in Connecticut, for its goods to be shipped directly to the

customers from Connecticut. This Court held that this business was part of the appellant's interstate commerce and not subject to local excise taxation, saying (pp. 153-4):

> "The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. * * * We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause."

8. In *McCarroll v. Dixie Lines*, 309 U. S. 176 (decided February 12, 1940) this Court held that a state tax allocated to highway purposes and imposed on each gallon of gasoline, above twenty, brought into the state by any motor vehicle for use as fuel in the operation of such vehicle through the state, was in violation of the Commerce Clause, and could not be validated as compensation for the privilege of using the state highways.

9. In *Western Live Stock* v. *Bureau*, 303 U. S. 250, decided February 28, 1938, this Court, in referring to state taxes violative of the Commerce Clause, said (p. 255):

> "The vice characteristic of those (state taxes) which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (citing cases) or added to (citing cases) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

10. To the same effect are:

Cooney v. *Mountain States Tel. Co.*, 294 U. S. 384, 392-3;

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 189, 216-8;
Airway Corp. v. *Day*, 266 U. S. 71, 81;
Kehrer v. *Stewart*, 197 U. S. 60, 65;
Caldwell v. *North Carolina*, 187 U. S. 622, 627;
McCall v. *California*, 136 U. S. 104, 109.

11. We conclude this citation of cases by quoting as follows from *Crutcher* v. *Kentucky*, 141 U. S. 47, 58:

> "As a summation of the whole matter it was aptly said by the present Chief Justice in *Lyng* v. *Michigan*, 135 U. S. 161, 166: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress.'"

F

Conclusion as to the Commerce Clause

(1) It is not enough, in order to uphold the state's levy, to ferret out with a divining rod any conceptual "local incident" to which to attach a tax, particularly where the state has already attached recompensing taxes to any local incident which might be imaginable.

As said by Mr. Justice Reed in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 87:

> "But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation".

And as said by this Court in *Nippert* v. *Richmond*, 327 U. S. 416, 423 (per Mr. Justice Rutledge):

> "The situation is difficult to think of in which some incident of an interstate transaction taking

place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax".

In the latter case, this Court held (p. 424) that the validity of the state tax upon the so-called "local incident",

> "depends upon other considerations of constitutional policy having reference to the substantial effects, *actual or potential*, of the particular tax in suppressing or burdening unduly the commerce." (Italics ours.)

(2) In the present instance, the tax involved is not on any local incident at all. It is on the very process and proceeds of interstate commerce. It is on an essential component of the interstate flow. It is on what is so inseparable from and integrated in the interstate transaction that, without it, the interstate transaction would and could not be itself or even exist at all.

Moreover, it is the kind of levy which involves the hazard of duplication in every one of the many states where the appellant has similar plants (R. 52). It also involves the hazard of duplication in Virginia (the domiciliary situs); in New York (the business situs); and in every other state where the goods are (a) sold by an established agent, (b) shipped from a stock of goods, or (c) delivered for consumption. (See pp. 4, 5, *supra*.)

Furthermore, it is unapportioned either to these potentialities, or to the totality of the commerce, or to any contribution, however real or imaginary, which Ohio may make to such commerce. It is on the full face amount.

(3) In short, as applied to this appellant, this Ohio tax, viewed realistically and according to the economic facts of life, is:

(1) a direct tax on interstate commerce (*Freeman vs. Hewit*, 329 U. S. 249, 255);

(2) a tax which potentially can "lend itself to repeated exactions in other states" (*Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 87);

(3) a tax unapportioned by any yardstick or relationship whatever or to other exactions, actual or potential (*Adams Mfg. Co. vs. Storen*, 304 U. S. 307, 311); and

(4) a tax on the gross proceeds of interstate sales contracts, not on the net income of the taxpayer (*United States Glue Co. vs. Town of Oak Creek*, 247 U. S. 321, 328-9).

(5) a tax which exposes appellant to "the risk of a multiple burden to which local commerce is not exposed" (*Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 439).

POINT II

Furthermore, and irrespective of the vice of being a direct tax on interstate commerce, the tax under appeal is on an intangible having no situs in Ohio.

Hence, its enforcement constitutes the taxing of property without "due process of law". Ohio has no jurisdiction over the receivables it has taxed.

A

There is no domiciliary situs in Ohio

The appellant is a Virginia corporation. Hence the fact that it has a manufacturing plant at Carthage, Ohio, gives to the intangibles involved no "domiciliary situs" in Ohio.

In *Newark Fire Insurance Co.* v. *State Board,* 307 U. S. 313, decided May 29, 1939, New Jersey assessed a tax against a New Jersey corporation upon the full amount of its capital stock paid in and its accumulated surplus. The tax was resisted upon the ground that the business situs of its intangibles and the tax domicile of the corporation were in New York where all its business affairs were conducted and its executive offices maintained. This Court sustained the tax in two opinions, each concurred in by four Justices. The opinion written by Mr. Justice Reed, and concurred in by the Chief Justice and Justices Butler and Roberts, said (p. 318):

> "In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty, the presumption is that such property is taxable by the state of the corporation's origin."

The opinion written by Mr. Justice Frankfurter and concurred in by Justices Stone, Black and Douglas, was to

the effect that the tax fell within the constitutional power of a state to tax a corporation of its own creation.

B

There is no business situs in Ohio

(1) Directly in point is *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, decided May 18, 1936.

There the facts were very similar. A Delaware manufacturing company conducted none of its business in that state but established its commercial domicile in West Virginia. In West Virginia it maintained its general business offices where its general accounts were kept, its stockholders and directors held their meetings, and its officers managed and controlled its operations, including what was done in its plants and sales offices in other states. All contracts of sale were subject to the approval of this main office and all invoices were payable there. It had bank deposits outside of West Virginia, resulting from deposits by its West Virginia office of commercial paper received from customers, which deposits were used in meeting payrolls and in paying for materials, equipment, and maintenance and operating expenses in the course of its manufacturing activities; but these local deposits were drawn upon only by the West Virginia office or under its direction.

West Virginia levied what this Court described (p. 204) as "an *ad valorem* property tax upon accounts receivable". The tax was challenged as violative of the Fourteenth Amendment (p. 204).

In approaching the issue this Court cleared the ground by first stating that (p. 208) "the tax is not a privilege or occupation tax. It is not a tax on net income". This Court then said (pp. 212-3):

> "Here, the tax is a property tax on the accounts receivable, as separate items of property, and these

are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of *ad valorem* property taxation, the accounts receivable which arise from sales and the manufacturing plants. *The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale.*" (Italics ours.)

(2) In *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234, decided April 26, 1937, a Delaware corporation transacted its corporate and fiscal business in Minnesota. In that state it maintained a business office and held its meetings of stockholders and directors. It owned a controlling interest in the stock of a number of banks of several states. The stock certificates of the subsidiaries were kept in Minnesota; and there the corporation received the dividends thereon and declared and disbursed its own dividends. From its office in Minnesota it actively exercised, through this stock ownership, its power of control of its subsidiary banks.

This Court held that the corporation's "commercial domicile" was in Minnesota, and that its shares of stock in the banking corporations in other states were subject to a "property tax" by Minnesota. This Court conceded that the tax was "the taxation of intangibles" (p. 241), and said (p. 237):

"But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicil' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus become integral

parts of some local business.' *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 210; see *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 8; *First National Bank* v. *Maine,* 284 U. S. 312, 331."

And again (p. 238):

> "Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much *'integral parts'* of the local business as *accounts receivable* in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare *Wheeling Steel Corp.* v. *Fox, supra,* 212-214. Thus identified with the business conducted by appellant in Minnesota, they are as subject to local property taxes as they would be if the owner were a private individual domiciled in the state." (Italics ours.)

(3) This concept of "a business situs" for an *ad valorem* tax on accounts receivable has always been associated with the concept of the *integration* of such receivables and of their avails with the locality of the general business and control by which the contracts embodying the receivables were made and into which the avails went. The location of such general business and control constituted the "business situs" of such receivables.

This concept of *"integration"* as an indicium of "business situs" is stated in 143 *A. L. R.* 367, 368, as follows:

> "In a number of decisions, mostly of recent origin, the courts have used, as a test for the legal existence of a business situs of intangible property for the purposes of property taxation in a state other than the domicil of the owner, the concept of 'localization' of the intangibles and their 'integration' with local business in the state. Instead of holding one particular outstanding fact or circumstance as an indispensable condition of such a situs, it is necessary under the 'integration doctrine,' in order to authorize taxation, that the intangibles have become an integral part of

some business activity, and that their possession and control be localized in some independent business or investment away from the owner's domicil, so that their substantial use and value primarily attach to and become an asset of the outside business, or, in other words, that the local independent business controls and utilizes, in its own operation and maintenance, the intangible property and its income."

See also 51 *Am. Jur., Sections* 469, 470, pages 480, 481, 482.

(4) In the present instance, the receivables involved and their avails are clearly "*integrated*" with the general interstate business conducted and the general interstate control exercised by the appellant at its executive offices in New York City.

That is the location of its executive management, its fiscal affairs, its bank deposits and its general fund. To that sovereign office all orders for appellant's goods must come for consideration and acceptance or rejection. There, by acceptance, the orders transform into contracts; and there, by these contracts, the terms of the indebtedness constituting the receivables are embodied and fixed. There the appellant's books of account which reflect these contracts and their terms are kept. There, also, the avails of the receivables—the payments in liquidation of them—are received and merged into the appellant's general fund there maintained.

Than this, no more complete "integration" can be conceived. The whole life process of the receivables from conception, through birth, life-span and ultimate extinction, takes place in and as part of the general interstate business of the appellant in New York.

C

Hence, Ohio has no jurisdiction to levy an *ad valorem* property tax upon these accounts receivable.

As stated by Mr. Chief Justice White in *Looney* v. *Crane*, 245 U. S. 178, 188, no state can "* * * exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state, in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment."

In *Buck* v. *Beach*, 206 U. S. 392, this Court said (pp. 408-9):

> "For the reason that, as the assessment in this case was made upon property which was never within the jurisdiction of the state of Indiana, the state had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law."

D

Since the interstate contracts and the indebtedness contracted therein, and their avails, are all integrated with the appellant's business in New York, Ohio has no jurisdiction over them on the theory of benefit or protection.

Mr. Justice Frankfurter in his concurring opinion in *Tax Commission* v. *Aldrich*, 316 U. S. 174, said (p. 183):

> "Of course, the Due Process Clause has its application to the taxing powers of the States—a State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no 'jurisdiction to tax.'"

The accounts receivable involved in this case have never been in Ohio under any stretch of imagination or

legalistic legerdemain, and the same are beyond the jurisdiction of Ohio to tax.

The appellant's contracting and selling business and its receipt, handling and use of the avails therefrom were and are all conducted and localized in New York.

The receivables and their avails were an integral part of that business. The localization of the greater carried with it the localization of the less.

Ohio could not either forbid, restrict or tax the appellant's right to conduct its general business in and from its sovereign business office in New York. Ohio could not forbid, restrict or tax the interstate contracts by which the appellant conducted such business from New York. As interstate contracts they had no localization in Ohio. Ohio had no part in the making of them; furnished no protection to them; and gave and could give nothing in return for any tax, *ad valorem* or otherwise, which it might attempt to impose upon them.

Even in the case of one of its residents, a state is barred by the Fourteenth Amendment from laying an *ad valorem* tax on his tangible property permanently located outside its jurisdiction. (*Greenough* vs. *Tax Assessors*, 331 U. S. 486, 491; and cases there cited.)

E

The fact that the appellant's executives in New York directed that shipment be made from the appellant's Ohio plant cannot give an Ohio situs to the antecedent contract and to the antecedent obligation of the orderer embodied therein.

(1) In *In re Harris Upham & Co.*, 194 Okla. 155, 148 Pac. (2d) 191, 194, 195, it was held (p. 159):

> "1. In order to constitute a business situs where intangible property is taxable other than the owner's domicile, it must be shown that the possession and

control of the property has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attaches to and becomes an asset of the outside business.

"2. Appellee, a copartnership domiciled in New York, engaged in business as a commission broker for purchase and sale of securities, maintains an agency in Oklahoma City, which agency is authorized to take orders for purchase and sale of securities and forward the same to a branch office. Said local agency is without authority to approve accounts or extend credit to local customers, but credits are extended to said customers by appellee's branch office located at Kansas City, Missouri, and the same appear as debit balances charged against Oklahoma customers of the appellee upon the books of the Kansas City office. *Held*, that said debit balances do not have a business situs for the purpose of taxation within this state under the provisions of the Intangible Personal Property Tax Act, 68 O. S. 1941, Sections 1501-1520."

In *National Metal Edge Box Company* v. *Readsboro*, 94 Vermont 405, 111 Atl. 386, the office of the company in the state of Vermont had nothing to do with the sale of goods manufactured there nor with fixing the price for which the goods were sold. All the business of the plaintiff conducted in Vermont consisted of manufacturing paper bound boxes and pulp which were sent to Philadelphia. The products also were shipped elsewhere on orders from the Philadelphia office in which case the memorandum of shipment was sent to the home office. The court held (to quote the official headnote):

"1. Where a foreign corporation with its principal place of business and home office in another state attended to all business matters and kept and collected all accounts originating at its manufacturing plant and branch office in this State at its home office, its accounts receivable originating from the business in this State were not taxable here."

Section 5328-2 of the General Code of Ohio, is similar in purport to a Louisiana statute, though differing somewhat in language. The Louisiana statute whose text and interpretation will be found in *Bowman-Hicks Lumber Company, Inc.* v. *Cole*, 151 La. 303, 308-9, 91 So. 744, 746, provides:

> "That the notes, judgments, accounts and credits of such non-resident persons, firms, corporations, partnerships, associations, or companies doing business in the State of Louisiana, originating from the business done in this State, be and the same is hereby declared to be property with its situs within the State, and subject to taxation at the business domicile in this State of the said non-resident person, firm, corporation, partnerships, association, or company, or their business agent or representative, under the same rules and in the same manner that property of a like nature is assessed and taxed within the State of Louisiana."

In the case just cited, the Supreme Court of Louisiana held that the accounts receivable of a foreign (Missouri) corporation could not be taxed in Louisiana merely because all shipments of goods originated in the Louisiana plants of the corporation, since the facts indicated that the business was actually done outside the state. In its opinion the court said at pages 309-310:

> "The facts are that plaintiff's domicile is in Kansas City, Missouri, where it maintains its principal business office. Its managers superintend all of its business from the Kansas City office, where its books, in which are entered all of its accounts and credits, are also kept. The output of its lumber manufacturing plants, which are located in Louisiana, is sold upon orders which must be accepted in Kansas City, from which place deliveries are ordered to be made in various parts of the country, all shipments, however, originating from its plants in Louisiana. Deliveries are made all over the United States outside of this state, purchases by Louisiana customers are

> sometimes made from the mill but such sales may only be made for cash and constituted, for the year 1920, not over 3 per cent. of the output of its plant. * * * 'Doing business,' in the sense in which it is applicable to plaintiff in this case, means selling the product which it manufactures in its lumber plants, and it appears, from the uncontested facts hereinbefore stated, that plaintiff's sales, from which taxable credits arise, are considered, made, and completed in Kansas City, at plaintiff's actual domicile, and that the only incident connected with these sales, which takes place in Louisiana, is shipment, which is made from plaintiff's mills. Under the language of the act, the credits do not arise from business done in this state, and they are therefore not taxable in this state."

The facts in this Louisiana case are practically identical with those involved herein.

(2) Ohio has already laid its tax on all the appellant's real and tangible personal property in Ohio, "including its products (whether in bulk or in cases)" (R. 52) and on the appellant's franchise to do business and manufacture in Ohio (p. 15, *supra*).

To the making of the interstate contracts which express these accounts receivable, it has furnished no benefit or protection whatever,—certainly none "adequate to support a tax exaction" of the present character, and not fully recompensed by other tax exactions. (*Greenough* vs. *Tax Assessors*, 331 U. S. 486, 491.)

POINT III

Furthermore, the tax under appeal, and the Ohio statute as construed and applied by the Ohio Supreme Court, are a violation of the Fourteenth Amendment in that they constitute a denial of "the equal protection of the laws".

Section 5328-2 of the General Code of Ohio, quoted from at page 8, *supra*, and quoted in full in the Appendix at page 48, *post*, defines, for the purpose of taxation, the "situs" of intangible personal property "when used in business".

As to the "situs" of "accounts receivable", it declares:

> "Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:
>
> In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state."

Section 5328-2 also declares:

> "The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed."

The effects of these provisions are:

(1) The "business situs" of an account receivable is determined for exemption or taxability by either of two alternatives, to-wit (a) the location of the stock source or (b) the location of the agency source.

Obviously, these alternatives work in favor of exemption for the Ohio resident and in favor of taxability for the non-resident. Exemption for the resident has two chances, whereas taxation of the non-resident follows from either.

An Ohio resident is *exempt* from taxation on a receivable "having a business situs outside of this state," in *either* of two contingencies, to wit: where such receivable was (a) one "resulting from the sale of property sold by an agent having an office in such other state, or (b) from a stock of goods maintained therein." On the other hand, *mutatis mutandis*, a non-resident is *taxed* in *either* of such two contingencies.

(2) Under these provisions, a resident of Ohio, in order to escape taxation on accounts receivable resulting from his sales, has merely to effect such sales either from a stock of goods maintained, or through an agent having an office, over the state line. On the other hand, a non-resident, if he sells either from a stock of goods maintained, or through an agent having an office, in Ohio, is taxable on the resulting receivables.

Thus, an Ohio resident, whether individual or corporate, may operate and control his business from his own residence or office in Ohio, and yet escape Ohio taxation on his receivables by the simple device of having them made through an agent or from a stock of goods conveniently located over the state line. On the other hand, a non-resident who ventures into Ohio with a stock of goods or an agency office automatically subjects his resulting accounts receivable to this Ohio tax.

Hence, an Ohio resident (individual or corporate) has two devices and two chances to *escape* taxation of intangible personal property in Ohio. On the other hand, when the factual situation is reversed, a non-resident (invidual or corporate) is made *taxable* by either of these chances.

To illustrate: If a non-Ohio corporation owned an account receivable from a sale by an agent with an office in Indiana but filled from a stock of goods in Ohio, such account receivable would be taxable in Ohio. On the other hand, if an Ohio corporation owned an account receivable resulting from a sale by an agent with an office in Indiana but filled from a stock of goods in Ohio, such account receivable would not be taxable in Ohio. Thus, an identical sale from a stock of goods maintained in Ohio through an agent having an office in Indiana would be taxable in a case where the seller was a non-resident but would not be taxable where the seller was a resident.

Thus, an Ohio resident or an Ohio corporation can *escape* taxation by doing business through either of two methods, whereas the competitor, a non-resident or a non-Ohio corporation, is *caught* with taxation upon doing business through either of the same methods.

This very case shows the appellant as in the grasp of this discrimination.

(3) A taxing statute which effects such discriminations contravenes "the equal protection clause" of the Fourteenth Amendment. It creates a special tax immunity and favored treatment for domestic residents and corporations not enjoyed by the non-domestic.

Although Ohio could require a foreign corporation seeking to do business in Ohio, to pay "an admission fee" to secure equal privileges with citizens of Ohio, nevertheless, after that fee has been paid and admission has been lawfully secured, "the foreign corporation stands equal and

is to be classified with domestic corporations of the same kind" (*Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 510-1). It cannot thereafter be discriminated against by subsequent legislation not part of the fee for admission (*Conn. General Co.* v. *Johnson*, 303 U. S. 77, 79, 80). As said in *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 623:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment."

(4) The arbitrary discrimination which results from the interpretation and application of the Ohio statute under appeal has the additional vice of infecting the field of competition.

It loads the dice of taxation to the advantage of the Ohio business man. (*Concordia Ins. Co.* vs. *Illinois*, 292 U. S. 535, 549.)

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, this Court held (to quote the headnotes):

> "Equal protection of the laws means subjection to equal laws applying alike to all in the same situation.
>
> A corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment.
>
> A corporation which comes into a State other than that in which it is created, pays taxes thereto and acquires property and carries on business therein, is within the jurisdiction of that State, and, under the Fourteenth Amendment, entitled to protection against any statute of that State that denies to it the equal protection of the laws.
>
> Arbitrary selection cannot be justified by calling it classification in the absence of real distinction on a substantial basis; and a classification for taxation

that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary and a denial of equal protection of the laws."

CONCLUSION

The judgment appealed from should be reversed, and judgment should be rendered for the appellant.

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APPENDIX

General Code of Ohio

Section 5325-1

[Application of term "used in business"; definition of word "business".] Within the meaning of the term "used in business," occurring in this title, personal property shall be considered to be "used" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.

Section 5328

[All taxable property to be entered on general tax list and duplicate.] All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and

interests therein, defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title.

Section 5328-1

Property to be entered on classified tax list and duplicate; exemption. All moneys, credits, investments, deposits and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will, license or franchise (whether granted by governmental authority or otherwise) of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

Section 5328-2

Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid. Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

In the case of accounts payable, the proportion of the entire amount of accounts receivable, wherever arising, represented by those arising out of business transacted in such other state ascertained as herein provided shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein

the owner resides, if an individual, or wherein its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

In the case of moneys, when kept on hand at an office or place of business in such other state.

In the case of investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, and (1) representing obligations of persons residing in such other state or secured by property located therein, or (2) when an officer or agent of the owner at the owner's office in such other state, has authority, in the course of the owner's business, to receive or collect the income thereon or the principal, if any, or both when due, or to sell and dispose of the same.

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.

Section 5638

Tax levy on intangible property on classified tax list; rates. Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to-wit:

Investments, five per centum of income yield or of income as provided by section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar.

The object of the taxes so levied are those declared in section 5639 of the General Code.